

**PUBLIC VERSION**  
**HIGHLY CONFIDENTIAL INFORMATION REDACTED**

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

M&G POLYMERS USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant

Docket No. NOR 42123

228824

**CSX TRANSPORTATION, INC.'S REPLY TO M&G POLYMERS USA, LLC**  
**REQUEST TO FILE THIRD AMENDED COMPLAINT**

**ENTERED**  
**Office of Proceedings**

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**Part of**  
**Public Record**

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Dated: February 11, 2011

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**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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M&G POLYMERS USA, LLC.

Complainant,

v.

CSX TRANSPORTATION, INC. and SOUTH  
CAROLINA CENTRAL RAILROAD COMPANY

Defendants.

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Docket No. NOR 42123

**CSX TRANSPORTATION, INC.'S REPLY TO M&G POLYMERS USA, LLC'S  
REQUEST TO FILE THIRD AMENDED COMPLAINT**

Defendant CSX Transportation, Inc. ("CSXT") respectfully submits this Reply to Complainant M&G Polymers USA, LLC's ("M&G's") January 31, 2011 letter informing the Board that M&G was filing a Third Amended Complaint adding two new lanes of traffic to its complaint ("January 31 Letter"). When M&G last sought to amend its complaint over three months ago, the Board permitted the amendment but warned M&G that "[a]ny amendments to the complaint sought in the future will be considered on a case-by-case basis." *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123, at 2 (Nov. 24, 2010). Despite the Board's statement that it would carefully consider any future requested amendments, M&G did not even deign to file a formal motion seeking leave to amend its complaint – instead, M&G simply announced that it was adding two new lanes that allegedly comprise "business [that] was not known, and could not have been known, by M&G at the time of filing the original Complaint or any of the subsequent amended Complaints." January 31 Letter at 1. Even if the January 31 Letter was construed as a motion for leave to amend the already-twice-amended complaint – which, for present purposes, CSXT is doing – M&G's attempt to insert new lanes into this

litigation over six months after filing its initial complaint and over six weeks since the close of discovery is unjustified and should be rejected. {{

}} There is no legitimate justification for M&G's failure to include these lanes in its initial complaint, and permitting M&G to reshuffle the lanes in its complaint for the third time would prejudice CSXT. Accordingly, M&G's attempt to add Lanes 51 and 52 to Exhibit B of its Complaint should be rejected.<sup>1</sup>

M&G filed its initial complaint on June 18, 2010. *See* Complaint, *M&G v. CSXT*, Docket No. 42123 (filed June 18, 2010). Two months later, M&G filed an amended complaint that deleted six lanes of challenged traffic and added five more. *See* Amended Complaint, *M&G v. CSXT*, Docket No. 42123 (filed Aug 16, 2010). In an effort to avoid unnecessary delay, CSXT did not object to the amendment, but reserved its right to object to future amendments. *See* Answer to Amended Complaint, *M&G v. CSXT*, Docket No. 42123, at 1 (filed Sept. 7, 2010). After two more months had passed, M&G filed yet another amended complaint, this time adding the South Carolina Central Railroad Company as a defendant and changing routings, rates, fuel surcharges, and revenue/variable cost ratios for three challenged movements. *See* Motion for Leave to File Second Amended Complaint, *M&G v. CSXT*, Docket No. 42123 (filed Oct. 18, 2010). While CSXT did not oppose this amendment, it noted that any future amendments – and

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<sup>1</sup> CSXT has no objection to M&G's amendment of its complaint to reflect M&G's settlement with the South Carolina Central Railroad Company; specifically, CSXT does not object to the amendments described in paragraphs 1 and 2 of the January 31 Letter.

particularly any attempts to add new lanes to the complaint – “would prejudice CSXT and potentially jeopardize the procedural schedule.” Reply to Motion for Leave to File Second Amended Complaint, *M&G v. CSXT*, Docket No. 42123 (filed Nov. 8, 2010). The Board permitted M&G to amend its complaint a second time, but it made clear that “[a]ny amendments to the complaint sought in the future will be considered on a case-by-case basis.” *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123, at 2 (Nov. 24, 2010). Discovery in this case closed on December 15, 2010. Six weeks later, M&G filed the instant letter purporting unilaterally to add more lanes to this case.

It is time for M&G’s serial amendments to end. This case has been pending for over six months, and M&G has already been allowed to amend its complaint on two previous occasions. More significantly, M&G waited to file this latest amendment until six weeks after the close of discovery. Permitting M&G to add lanes to its complaint after the close of discovery would abridge CSXT’s due process rights. For instance, M&G’s delay has foreclosed CSXT’s ability to pose lane-specific discovery requests for the new lanes.<sup>2</sup> In addition, M&G’s last-minute additions have prejudiced CSXT’s ability to prepare evidence in this case. CSXT has invested considerable time in analyzing the complaint lanes, and indeed CSXT has proffered evidence regarding M&G’s competitive options for many of the issue movements.<sup>3</sup> Allowing

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<sup>2</sup> While M&G asserted in the January 31 Letter that it would provide discovery to CSXT at some future date in response to previous CSXT discovery requests for information about issue movements, M&G has yet to do so. Regardless, M&G’s promise to produce documents in response to previously posed discovery requests does not cure the serious due process concerns that would be raised if M&G were allowed to insert new lanes into its complaint at a time when CSXT is no longer permitted to pose additional discovery requests regarding those lanes.

<sup>3</sup> In the event that the Board permits M&G to add new lanes to its complaint, the Board should give CSXT the opportunity to proffer additional market dominance evidence for those new lanes in support of CSXT’s Motion for Expedited Determination of Jurisdiction Over Challenged Rates (filed Jan. 27, 2011).

M&G to revise its complaint yet again could require CSXT to revisit this analysis and would unfairly prejudice CSXT.

M&G's excuse for its untimely attempt to add Lanes 51 and 52 to Exhibit B is that at the time it filed its previous complaints it could not have known of potential business from Apple Grove to Lexington, KY (proposed Lane 51) or Apple Grove to Prattville, AL (proposed Lane 52).<sup>4</sup> See January 31 Letter at 1. {{

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<sup>4</sup> Each of the two new proposed movements is a joint line movement. For lane 51 CSXT originates traffic at Apple Grove and interchanges it with the R. J. Corman Railroad/Central Kentucky Lines at Winchester for delivery to Lexington. For lane 52 CSXT originates traffic at Apple Grove and interchanges it with the Norfolk Southern at Cincinnati for delivery to Prattville.

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The Board should not permit M&G to add new lanes to its complaint at this extraordinarily late date.

\* \* \*

For the foregoing reasons, M&G's (implicit) request for leave to amend its complaint to add Lanes 51 and 52 to Exhibit B should be denied.

Respectfully submitted,

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*Counsel to CSX Transportation, Inc.*

Dated: February 11, 2011

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of February, 2011, I caused a copy of the foregoing Reply to Request to File Third Amended Complaint to be served on the following parties by electronic mail and postage prepaid or more expeditious means of delivery:

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## Exhibits

**HIGHLY CONFIDENTIAL  
EXHIBITS 1 - 7 REDACTED**